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MEMORANDUM OF LAW

DATE: October 13, 2006

TO: Councilmember Donna Frye

FROM: City Attorney

SUBJECT: Ordinance Banning the Sale of Foie Gras in the City of San Diego

INTRODUCTION

"Foie gras" is a French term meaning fatty liver. Foie gras, the product, is considered a delicacy and is derived by force-feeding ducks and geese large amounts of meal to enlarge the birds' livers. There are apparently three major producers of foie gras in the United States; two are located in upstate New York (Hudson Valley Foie Gras Company and La Belle Poultry); and one is located in the Central Valley of California (Sonoma Foie Gras).[1] Supporters of a ban on the sale of the product contend the process of force feeding these birds is inhumane.

In September 2004, California passed legislation that would ban both the force feeding of these birds and the sale of any product resulting from such forced feeding. The prohibitions of the statute are not operative until July 1, 2012. *See* Sen. Bill 1520, Attachment A.

In April 2006, the City of Chicago enacted an ordinance banning the sale of foie gras by food dispensing establishments within that City's limits, becoming the first city in the United States to do so. *See* City of Chicago's ordinance, Attachment B. That ordinance is currently the subject of litigation claiming it is void because it violates the Illinois Constitution. The Chicago City Council is also considering whether to repeal the ordinance.

Councilmember Donna Frye has asked this office whether the City of San Diego may also legally ban the sale of foie gras within the City limits. This office assumes for purposes of this memorandum that the language of any proposed ordinance would be similar to the state law. We address whether such an ordinance is legally permissible and if so, with what limitations.

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[1] Sen. Bill Analysis, 3d reading Sen. Bill. No. 1520 (2003-2004 Reg. Sess.) as amended August 17, 2004, p. 4.

QUESTION PRESENTED

May the City of San Diego prohibit the sale of any product in the City of San Diego if the product (foie gras) is the result of force feeding a bird for the purpose of enlarging the bird's liver beyond normal size?

SHORT ANSWER

It is a close legal question whether the City Council may exercise its police powers and prohibit the sale of any product in the City of San Diego [City] if the product is the result of force feeding a bird for the purpose of enlarging the bird's liver beyond normal size. However, any such local ordinance may be enforced only until the state law becomes operative.

BACKGROUND

For more than six months in 2004, the California Legislature debated Senate Bill 1520. The bill was signed into law by the governor on September 29, 2004, adding Chapter 13.4 and sections 25980 through 25984 to the California Health and Safety Code, effective January 1, 2005. The purpose of the new law is to punish those who fail to meet humane standards for the treatment of birds, similar to procedures in place for the treatment of horses. *See* Legis. Counsel's Dig. Sen. Bill No. 1520 (2003-2004 Reg. Sess.) 3 Stats. 2004, p. 5307.

The legislation prohibits the force feeding of ducks and geese for the purpose of enlarging their livers beyond their normal size, and bans the sale of products resulting from such force feeding. Cal. Health & Safety Code §§ 25981, 25982. [2] It provides civil penalties for violations of the prohibitory sections. § 25983. The operative date of the legislation was delayed until July 1, 2012, to permit businesses engaged in force feeding birds time to modify their existing practices. § 25984. Also, any persons or entities engaged in, or controlled by persons engaged in, the force feeding of birds when the legislation was enacted were provided immunity from liability during the period January 1, 2005, until July 1, 2012. *Ibid.*

ANALYSIS

I. The City of San Diego May Ban the Sale of Foie Gras until July 1, 2012.

A. The Proposed Local Ordinance and the State Law.

For purposes of our legal analysis, we presume the language of this ordinance would parallel the language of section 25982. For example, the City's ordinance would incorporate the

[2] Future references are to the California Health and Safety Code unless otherwise indicated.

statutory definitions found in section 25980.[3] Similarly, section 25982 provides that "A product may not be sold in California if it is the result of force feeding a bird for the purpose of enlarging the bird's liver beyond normal size." A local ordinance might provide that "A product may not be sold in the City of San Diego if it is the result of force feeding a bird for the purpose of enlarging the bird's liver beyond normal size."

B. The Ordinance is a Proper Exercise of Police Powers.

The California Constitution provides cities or counties within the state with the authority to "make and enforce within [their] limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." Cal. Const. art. XI, § 7; *American Financial Services Assoc. v. City of Oakland,* 34 Cal. 4th 1239, 1251 (2005); *Sherwin-Williams Co. v. City of Los Angeles,* 4 Cal. 4th 893, 897 (1993). This local power is as broad as that of the Legislature. But this power may be exercised only within the confines of the city and may not be in conflict with the state's general laws. *Carlin v. City of Palm Springs*, 14 Cal. App. 3d 706, 711 (1971).[4]

A city has broad discretion to determine what is reasonable in endeavoring to protect the public health, safety, morals, and general welfare of its residents. *Ibid.* A local ordinance banning the sale of a product because it results from the inhumane treatment of birds would likely be found a reasonable exercise of the police power of the City. It, like the state law, would help ensure the City's residents do not partake of food products resulting from the inhumane treatment of birds and would deter the local sale of such products.

C. The Municipal Affairs Doctrine is Inapplicable.

Charter cities, such as San Diego, may sometimes have an advantage over general law cities. They may "adopt and enforce ordinances that conflict with general state laws, provided

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[3] Section 25980 provides: "For purposes of this section, the following terms have the following meanings:
(a) A bird includes, but is not limited to, a duck or goose.
(b) Force feeding a bird means a process that causes the bird to consume more food than a typical bird of the same species would consume voluntarily. Force feeding methods include, but are not limited to, delivering feed through a tube or other device inserted into the bird's esophagus."

[4] A county has the same authority to enact regulatory ordinances within its limits. Generally speaking however, cities and counties do not exercise concurrent jurisdiction over regulatory matters. A county ordinance would generally have no binding effect in any incorporated city within that county. *Great Western Shows, Inc. v. County of Los Angeles,* 27 Cal. 4th 853, 870-871 (2002); *Ex parte Pfirrmann*, 134 Cal. 143, 145 (1901); *In re Knight*, 55 Cal. App. 511, 518 (1921).

the subject of the regulation is a 'municipal affair' rather than one of 'statewide concern.' [Citations]." Cal. Const. art. XI, § 5; *American Financial*, 34 Cal. 4th at 1251; *Sherwin-Williams*, 4 Cal. 4th at 897. However, California has already enacted section 25982, which will ban the sale of foie gras statewide beginning in 2012. The subject of this local ordinance will encompass an area of statewide concern and not the regulation of a municipal affair. *See American Financial*, 34 Cal. 4th at 1251; *Sherwin-Williams*, 4 Cal. 4th at 897, n.1. Thus, the "municipal affairs" doctrine has no applicability. Whether a charter city like San Diego may adopt such a local ordinance turns on whether the proposed ordinance "conflicts" with state law.

D. The Proposed Local Ordinance Conflicts with the Future Operation of the State Law.

There are three ways in which an ordinance may conflict with state law. "A conflict between state law and an ordinance exists if the ordinance duplicates or is coextensive therewith, is contradictory or inimical thereto, or enters an area either expressly or impliedly fully occupied by general law." *American Financial*, 34 Cal. 4th at 1251. We address two potential areas of conflict: duplicative language; and entrance into an area fully occupied by state law.

1. The Proposed Local Ordinance Will Duplicate and Conflict with the State Law in 2012.

"[A]n ordinance which is substantially identical with a state statute is invalid because it is an attempt to duplicate the prohibition of the statute." *Pipoly v. Benson*, 20 Cal. 2d 366, 370 (1942) (citations omitted). When a statute and ordinance duplicate each other such to cause the ordinances invalidity, "[t]he invalidity arises, not from a conflict of language, but from the inevitable *conflict of jurisdiction* which would result from dual regulations covering the same ground." *Pipoly*, 20 Cal. 2d at 371 (emphasis added). Section 25984 (a) specifically provides that "Sections 25980, 25981, 25982, and 25983 of this chapter shall become operative on July 1, 2012." There is no question a local ordinance mirroring the provisions of section 25982 will be invalid when section 25982 becomes operative.

The open question is whether there is a conflict of jurisdictions during the extended period of time the state has decided to suspend the law's prohibitory sections. This appears to be a unique issue. We have been unable to locate direct authority discussing whether a suspended state law may preempt a local ordinance. However, we do not see how a conflict in jurisdictions may occur during any period in which the state's jurisdiction is suspended. Accordingly, we conclude there should be no conflict in jurisdiction to preclude enforcement of a local ordinance mirroring section 25982 *before* July 1, 2012.

2. The Proposed Local Ordinance Enters an Area of Law Fully-Occupied by the State Law in 2012.

A conflict may also occur when an ordinance enters a field "fully-occupied" by state law. *American Financial*, 34 Cal. 4th at 1251-1255. There is no *express* language in the state law indicating its intent to fully occupy this area of the law. However, the language of Senate Bill 1520 does seem to imply that intent.

Courts may imply a state law intends to fully-occupy an area of law "in light of one of the following indicia of intent: '(1) the subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern; (2) the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; or (3) the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the' locality [citations]." *Sherwin-Williams Co. v. City of Los Angeles*, 4 Cal. 4th 893, 898 (1993).

California expressly delayed implementation of the prohibitory provisions of this state law in order to provide "persons or entities engaged in agricultural practices that include raising and selling force fed birds [time] to modify their business practices." § 25894(a) and (c). The state legislature also provided immunity from both civil and criminal penalties in section 25984(b).[5] This acknowledgment of the potential for local action and protection against it would likely be strong evidence to a court that the state law intended to fully occupy the field, if the immunity encompassed all parties for all the statute's prohibitory acts. *See American Financial*, 34 Cal. 4th at 1254-1255.

At first glance, the language of section 25894(b)(1) and (2) appears do just that -- provide broad immunity from *any* criminal or civil action for *any* person or entity for *any* act prohibited by the chapter during the period the chapter is inoperative. Closer scrutiny of the rest of the subdivision, however, shows that protection is more limited. Section 25894 (b)(3) specifically *limits* application of "the protections afforded by this *subdivision* . . . *only* to persons or entities who were engaged in, or controlled by persons or entities who were engaged in, agricultural

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[5] Section 25984(b) provides the following:
"(1) No civil or criminal cause of action shall arise on or after January 1, 2005, nor shall a pending action commenced prior to January 1, 2005, be pursued under any provision of law against a person or entity for engaging, prior to July 1, 2012, in any act prohibited by this chapter.
(2) The limited immunity from liability provided by this subdivision shall not extend to acts prohibited by this chapter that are committed on or after July 1, 2012.
(3) The protections afforded by this subdivision shall only apply to persons or entities who were engaged in, or controlled by persons or entities who were engaged in, agricultural practices that involved force feeding birds at the time of the enactment of this chapter."

practices that involved force feeding birds at the time of the enactment of this chapter." (emphasis added). Where there is express language limiting a statute's applicability, courts generally apply the statutes as so limited using general principles of statutory construction. *See Jenkins v. County of Los Angeles*, 74 Cal. App. 4th 524, 533-534 (1999).[6] Section 25894(b)(3) is not ambiguous. If the Legislature had intended the immunity from liability to include all those who sold the described products, it would not have limited the applicability of the section as it did.

We conclude that section 25894(b)(3) means what it says. The immunity from liability for civil or criminal prosecutions during the time period when the state law is inoperative applies *only* to persons or entities engaged in, or controlled by those engaged in, the prohibited *agricultural* practices when the state law was enacted. In other words, sellers are not immune from liability *unless* they were engaged in, or controlled by those engaged in, the prohibited agricultural practices when the state law was enacted. The specific exclusion of certain sellers from the protection the statute affords to others seems to indicate the state did *not* intend to fully occupy the more limited area of law governing the sale of the product during its period of inoperability.

It is a close question whether the state intended to fully occupy *only* the area of law controlling those engaged in the prohibited agricultural practices. It is one that may ultimately require court resolution. However, the statute's language provides a legitimate argument that the state did not intend to occupy the field prohibiting *sale* of the product. Thus a local ordinance attempting to regulate that sale should not conflict with the state law until 2012.

If the City of San Diego wishes to enact an ordinance banning the sale of products that result from the force feeding of birds *until* the state law becomes operative, it should be legally permissible do so. If the City chooses this option, we would also recommend the ordinance contain language clarifying that it would not apply to sellers of the product if they were engaged in, or controlled by those engaged in, the prohibited agricultural practices on January 1, 2005. The ordinance should also include a sunset provision to coincide with the operative date of section 25982.

II. Other Legal Considerations.

Should the City Council proceed with such an ordinance, this office must caution that such a ban on the sale of a product in interstate commerce may attract other legal challenges.

[6] When express limiting language is absent, a statute may be interpreted as having broader application. *See Calvillo-Silva v. Home Grocery*, 19 Cal. 4th 714, 723-732, 735 (1998).

A. The Dormant Commerce Clause.

Local ordinances (or state statutes) that ban from sale items that are in interstate commerce have been subject to claims they violate the dormant Commerce Clause of the federal constitution. U.S. Const. art. 1, § 8, cl. 3. Whether any ordinance will survive such a challenge is always an open question to some degree.

The core purpose of the dormant Commerce Clause is to prevent states and their political subdivisions from promulgating protectionist policies. *Houlton Citizens' Coalition v. Town of Houlton*, 175 F.3d 178, 188 (1st Cir. 1999) and cases cited. Local ordinances that *explicitly* discriminate against interstate commerce are "treated as all but per se unconstitutional." *Nat'l Paint & Coatings Ass'n. v. City of Chicago*, 45 F.3d 1124, 1131 (7th Cir. 1995), referencing *C & A Carbone, Inc. v. Clarkstown*, 511 U.S. 383 (1994). Even a facially valid ordinance, like the one under consideration may be challenged and could violate the dormant Commerce Clause if it "imposes a burden on interstate commerce that is 'clearly excessive in relation to the putative local benefits.'" *Carbone*, 511 U.S. at 390, citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970); See *also Blue Circle Cement, Inc. v. Board of County Commissioners of County of Rogers*, 27 F.3d 1499, 1512 (10th Cir. 1994)

The City of Chicago banned the sale of spray paint and phosphate detergents long before it banned the sale of foie gras. Both earlier ordinances successfully withstood constitutional challenges alleging they violated the dormant Commerce Clause. *Nat'l Paint & Coatings Ass'n v. City of Chicago*, 45 F.3d 1124, 1130-1132 (7th Cir.1995); *Procter & Gamble Co. v. Chicago*, 509 F.2d 69 (7th Cir. 1975).[7] This office cannot predict with certainty the outcome of any given court hearing. We would be hopeful the ordinance under consideration by this City Council would withstand such a constitutional challenge.

III. Limitations and Penalty Provisions.

Assuming the City Council wishes to go forward, the Council may also wish to discuss limitations to the ordinance's application, and it should decide the penalty for a violation.

A. Limiting Applicability to Certain Businesses.

The City Council may wish to decide whether such an ordinance should apply to the sale by any person or entity anywhere in the City, as does the state law for the state, or whether a more limited application is advisable. For example, a logical placement of such an ordinance would be within Chapter Four, Article Two, Division One of the San Diego Municipal Code [SDMC], which regulates health and sanitation issues, including food sales in health regulated businesses. Instead

[7] As the court in *National Paint* said at page 1132, "Chicago's law may well be folly; we are confident that it is constitutional."

of applying to all persons, the ordinance could be drafted to prohibit sales only by such a "health regulated business."[8]

B. Penalty Provisions.

Section 25983 provides that those who violate the state law provisions are liable only for civil penalties up to $1,000 for each violation, and up to $1,000 for each day the violation continues.[9] The Chicago ordinance provides for fines ranging from $250 to $500 for each offense and each day the violation continues. General provisions of the SDMC provide for

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[8] A health regulated business is defined as including "any restaurant, itinerant restaurant, vessel, cafe, cafeteria, lunch counter, soda fountain, ice cream parlor, soft drink stand, fruit or produce stand, grocery, bakery, confectionery, delicatessen store, cannery, pet shop, bottled water establishment, candy factory, packing plant, concession (temporary or permanent), winery, liquor establishment, fish market, vending vehicle, vending machine, mobile food unit, pushcart, caterers, catering equipment rental establishment, or other place where food or beverages are prepared for sale, or are sold, stored, distributed or displayed for sale, or are caused or permitted to be given away. They shall be regulated as herein provided. [¶] Health regulated businesses shall not include private homes or cooperative arrangements by employees who purchase food or beverages for their own consumption and where no employee is assigned full time to care for or operate equipment used in such arrangement; nor shall the term 'health regulated business' include churches, church societies, private clubs or other non profit associations of a religious, philanthropic, civic improvement, social, political, or educational nature, which purchase food, food products, or beverages or which receive donations of food, food products, or beverages, for service without charge to their members, or for service or sale at a reasonable charge to their members or to the general public at occasional fund–raising events, for consumption on or off the premises at which the food, food products, or beverages are served or sold, if the service or sale of such food, food products or beverages does not constitute a primary purpose of functions of the club or association, and if no employee or member is assigned full time to care for or operate equipment used in such arrangement."

[9] Section 25983 provides

"(a) A peace officer, officer of a humane society as qualified under Section 14502 or 14503 of the Corporations Code, or officer of an animal control or animal regulation department of a public agency, as qualified under Section 830.9 of the Penal Code, may issue a citation to a person or entity that violates this chapter.

(b) A citation issued under this section shall require the person cited to pay a civil penalty in an amount up to one thousand dollars ($1,000) for each violation, and up to one thousand dollars ($1,000) for each day the violation continues. The civil penalty shall be payable to the local agency initiating the proceedings to enforce this chapter to offset the costs to the agency related to court proceedings.

(c) A person or entity that violates this chapter may be prosecuted by the district attorney of the county in which the violation occurred, or by the city attorney of the city in which the violation occurred."

criminal sanctions as misdemeanors or infractions with a range of criminal fines (SDMC § 12.0201); or for civil penalties up to $2,500 per day (SDMC § 12.0202).

If the City Council seeks consistency with state law, the penalty provisions of the local ordinance could be drafted to provide civil penalties consistent in amount with the state law.

CONCLUSION

This office concludes that it is a close legal question whether the City of San Diego may enact an ordinance that would prohibit the sale of products resulting from the force feeding of birds. Should the City Council elect to go forward, any proposed ordinance should incorporate the language and definitions included in the state law. It should include a provision to sunset when the state law regulating the same conduct goes into effect on July 1, 2012. It should include language that excludes from its operation persons or entities covered by the immunity granted under section 25894. In addition, the City Council may wish to consider whether the ordinance should be applied as broadly as the state law or to a more limited class of sellers. Finally, the City Council should decide whether the penalties imposed for violations should be consistent with or different from those established in the state law.

This office will prepare an appropriate draft ordinance after we receive the City Council's direction on these various issues.

MICHAEL J. AGUIRRE, City Attorney

By
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Attachments
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